SUPREME COURT, U. S.
MICHAEL RODAK, JR.

IN THE

Supreme Court of the United States

October Term, 1973

No. 72-1382

F. D. RICH CO., INC.;
TRANSAMERICA INSURANCE COMPANY,
Petitioner,

v.

UNITED STATES OF AMERICA,
for the use of
INDUSTRIAL LUMBER COMPANY, INC.
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

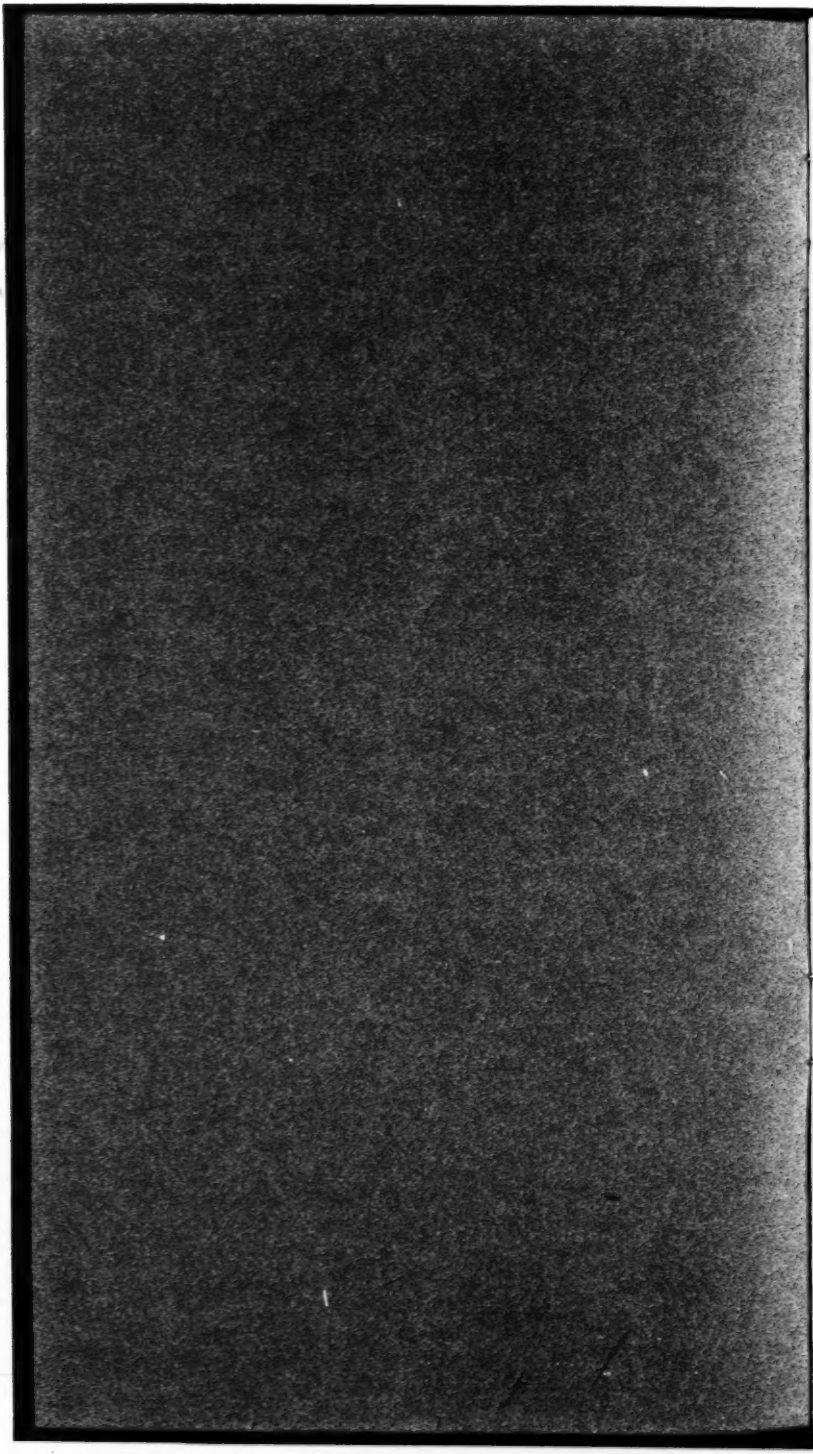
Brief For Respondent In Opposition

E. M. MURRAY
DENNIS S. HARLOWE
GORDON, THOMAS, HONEYWELL, MALANCA, PETERSON, O'HERN & JOHNSON
2200 One Washington Plaza
Tacoma, Washington 98402

W. AUSTIN COOPER
COOPER, SARKISIAN & SANDS
Court Plaza Building
901 H Street Suite 610
Sacramento, California 98514

Counsel for Respondents

CRAFTSMAN ◆ MET PRESS ◆ SEATTLE, WASHINGTON



SUBJECT INDEX

	Page
Opinion Below	1
Jurisdiction	1
Questions Presented	2
Statement of the Case	3
Argument	3
Conclusion	7

TABLES OF AUTHORITY

Table of Cases

Arnold v. U.S. ex rel. Bowman Mechanical Contractors, Inc., 470 F.2d 243 (10th Cir. 1973) 4

B. C. Richter Contracting Co. v. Continental Casualty Co., 230 Cal. App. 2d 491 (1964) 4

Clifford F. MacEvoy Co. v. U.S. ex rel. Calvin Tomkins Co., 322 U.S. 102 (1944) 6, 7

Fleischman v. Maier Brewing Co., 386 U.S. 714, 18 L. Ed. 2d 475 4

T. F. Scholes, Inc. v. United States, 295 F.2d 366 (10th Cir. 1961) 4

Transamerica Insurance Co. v. Red Top Metal, Inc., 384 F.2d 752 (5th Cir. 1967) 4

Travelers Indem. Co. v. U.S. ex rel. Western Steel Co., 362 F.2d 896 (9th Cir. 1966) 6

United States ex rel. Brady's Floor Covering, Inc. v. Breeden, 110 F. Supp. 713 (D.C. Alaska 1953) 4

U.S. ex rel. Capolino Sons, Inc. v. Electronic & Missile Facilities, Inc., 364 F.2d 705, (2d Cir. 1966) *cert. den.*, 385 U.S. 924 5

U.S. ex rel. Chevron Asphalt Co. v. Maryland Cas. Co., 316 F. Supp. 750 (E.D. Cal. 1970.. 4-5

Page

U.S. ex rel. Industrial Lumber Company, Inc. v. F. D. Rich Co., Inc., 473 F.2d 720 (9th Cir. 1973) 1, 2, 3, 4, 5

United States ex rel. Magnolia Petroleum Co. v. H. R. Henderson & Co., 126 F. Supp. 626 (D.D. Ark. 1955) 4

United States ex rel. White Masonry, Inc. v. F. D. Rich Co., 434 F.2d 855 (9th Cir. 1970) 4

Statutes

40 U.S.C. §270b(b) 5

Other Authority

Fed. R. Civ. P. 1 6

Supreme Court Rule 19(b) 3

IN THE

Supreme Court of the United States

October Term, 1973

No. 72-1382

F. D. RICH CO., INC.;
TRANSAMERICA INSURANCE COMPANY,
Petitioner,

v.

UNITED STATES OF AMERICA,
for the use of
INDUSTRIAL LUMBER COMPANY, INC.
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Brief For Respondent In Opposition

OPINION BELOW

The opinion of the Court of Appeals is officially reported. *U.S. ex rel. Industrial Lumber Company, Inc. v. F. D. Rich Co., Inc., et al.*, 473 F.2d. 720 (9th Cir., 1973).

JURISDICTION

Respondent does not question the jurisdiction as set forth in the Petition.

QUESTIONS PRESENTED

Petitioner's "background" introducing the questions presented is an inaccurate summary. Respondent refers to the opinion of the Court of Appeals for a more accurate statement of the facts found by the District Court as established by the evidence. 473 F.2d 270 *et seq.*

Each of the questions presented have been previously considered and rejected:

1. Award of Attorneys' Fees. California law awards attorneys' fees on projects covered by mandatory state contractors' bonds. Those engaged in work for the federal government in California are protected at least as well as are those engaged in non-federal work, whom the state protects.

2. Venue. So far as Petitioner F. D. Rich Co., Inc. is concerned, this suit was brought in California where "the contract was to be performed and executed." The surety having the Miller Act bond on the California project was not held liable by the Court of Appeals for the two shipments under the contract diverted to South Carolina by Rich. Rich was not prejudiced by having a single trial in California for all money due on the one contract.

3. Subcontractor status. Petitioner's challenge to the status of Cerpac as a subcontractor ignores the facts established in the record. Much more than just the existence of two contracts supports the finding and conclusion that Cerpac was a subcontractor for all purposes within the meaning of the Miller Act and not an ordinary materialman. Cerpac had "a special, integral, almost symbiotic relationship with Rich . . . (the) relationship was both 'substantial and important.'" 473 F.2d, page 724.

STATEMENT OF THE CASE

Petitioner's statement of the case is inaccurate. Respondent again refers to the factual presentation contained in the opinion of the Court of Appeals, 473 F.2d 720 (9th Cir., 1973), for a more accurate statement of the facts established by the evidence.

Some of the particulars Petitioner's statement of the case ignores are: (a) a substantial and important relationship between Rich and Cerpac existed over a period of several years and throughout the period of the dispute here involved; (b) the actual text of the contracts taken by Cerpac from Rich represented a substantial and complete segment of the work required under the prime contract between Rich and the United States at Beale Air Force Base, California and on many similar projects; (c) the contract between Cerpac and Industrial was not rescinded by an additional oral promise of Rich to see that Industrial was paid; (d) the "other contracts" referred to by Petitioner were not with "other parties" but contracts between Cerpac and Rich (e) Transamerica was the surety which bonded the job at Beale Air Force Base but the judgment in this case was not entered against Transamerica by the Court of Appeals so far as the two shipments diverted by Rich to South Carolina are concerned; (f) Rich was in no way prejudiced by having these two shipments considered at the trial in California along with all others under the same contract.

ARGUMENT

None of the reasons put forth by Petitioner can be fairly construed to merit review on Writ of Certiorari. Rule 19(b), Supreme Court Rules.

1. *Attorneys' Fees.* Petitioner claims the decision of the Court of Appeals in the instant case seems to conflict with the decision of this Court in *Fleischmann v. Maier Brewing Co.*, 386 U.S. 714, 18 L. Ed. 2d 475. This contention was considered at length and rejected in the opinion of the Court of Appeals, 473 F.2d, pages 726-728.

There is substantial authority for the award of attorneys' fees in Miller Act cases, when such fees are allowed by the referent state law. *Arnold v. U.S. ex rel. Bowman Mechanical Contractors, Inc.*, 470 F.2d 243 (10th Cir., 1972); *United States ex rel. White Masonry, Inc. v. F. D. Rich Co.*, 434 F.2d 855 (9th Cir., 1970); *Transamerica Insurance Co. v. Red Top Metal, Inc.*, 384 F.2d 752 (5th Cir., 1967); *T. F. Scholes, Inc. v. United States*, 295 F.2d 366 (10th Cir., 1961); *United States ex rel. Magnolia Petroleum Co. v. H. R. Henderson & Co.*, 126 F. Supp. 626 (D.C. Ark., 1955); *United States ex rel. Brady's Floor Covering, Inc. v. Breeden*, 110 F. Supp. 713 (D.C. Alaska, 1953).

The reliance placed by Petitioner on the California state decision in *B. C. Richter Contracting Co. v. Continental Casualty Co.*, 230 Cal. App. 2d 491 (1964), is similarly misplaced, and the contention was refuted in the opinion of the Court of Appeals, 473 F.2d 727. As stated in *U.S. ex rel. Chevron Asphalt Co. v. Maryland Cas. Co.*, 316 F. Supp. 750 (E.D. Cal., 1970) at page 753:

> "This is not an Erie-type case where the federal court applies state law. United States Fidelity & Guaranty Co. v. Hendry Corporation, *supra* 391 F. 2d at 21. In Erie cases the court may apply the law precisely as it exists. Here the court is looking to state law to determine what the federal law should be ..... filling an interstice in the Miller Act. *Id.* at 21. It is obviously pointless to apply the state law literally when the

> whole purpose of the federal law in the first place is to *extend* the application of a general principle of state law. State law cannot protect laborers and materialmen working on federal projects because mechanics' liens do not attach on federal property. *See* United States v. Munsey Trust Co., 332 U.S. 234, 241, 67 S. Ct. 1599, 91 L. Ed. 2022 (1947). If a state cannot provide protection for laborers and materialmen working on federal projects, it is likely to have no statute allowing the award of attorney fees in an action brought in such a case. The California District Court of Appeal misconceived the reason for looking to state law and thus applied state law literally rather than looking for a state policy. The application of the state policy is more consistent with the purpose of the Miller Act than application of the literal language of state statutes."

2. *Venue.* Petitioner claims that a mandatory jurisdictional provision of the Miller Act was ignored when the Court of Appeals affirmed the Judgment against Rich as to the two shipments under the Beale Air Force Base contract which were diverted to South Carolina. Transamerica, the surety with Miller Act bond coverage for Beale Air Force Base was not held liable for these two particular shipments. The basis for this distinction is set forth in the Appellate decision at 473 F.2d, page 725. The statutory provision referred to is 40 U.S.C. Sec. 270 b (b) which provides:

> "Every suit instituted under this section shall be brought in . . . the United States District Court for any district in which the contract was to be performed and executed and not elsewhere . . ." 40 U.S.C. Sec. 270 b (b).

This provision is not jurisdictional, but only a venue provision. *U.S. ex rel. Capolino Sons, Inc. v. Electronic & Missile Facilities, Inc.*, 364 F.2d 705, 707 (2d Cir., 1966), *certiorari denied*, 385 U.S. 924.

At no time prior to the instant Petition has Rich claimed it was prejudiced by the inability to subpoena witnesses for the trial of this case, and no such prejudice exists. All the material involved in this case was ordered from Respondent under a single contract for use in the prosecution of work at Beale Air Force Base, located within the Eastern District of California. A claim against the prime contractor for payment for the materials so ordered cannot be defeated merely because the prime contractor chose to divert two shipments of many for its own convenience. To hold otherwise would defeat the remedial and liberally construed provisions of the Miller Act, *Clifford F. MacEvoy Co. v. U.S. ex rel. Calvin Tomkins Co.*, 322 U.S. 102, 104 (1944), and would not achieve the just, speedy, and inexpensive determination of every action. Rule 1, Federal Rules of Civil Procedure.

3. *Subcontractor.* All of the circumstances shown by the evidence at the trial and considered on appeal—not alone the existence of more than one contract between the parties for substantial portions of the prime contract on the Beale Air Force Base project—establish the status of Cerpac as a subcontractor within the technical meaning of the Miller Act and the usage established in the building trades. MacEvoy, *supra*, 322 U.S. pages 108-109; See: *Travelers Indem. Co. v. U.S. ex rel. Western Steel Co.*, 362 F.2d 896, 898 (9th Cir., 1966).

Cerpac was a subcontractor of Rich for all plywood and all millwork on all of the many government housing projects of Rich throughout the United States between 1963 and 1966. The principal stockholders of Rich controlled and financed Cerpac. Until 1965 the two companies

were located in close physical proximity to one another, and the close personal and financial relations between the companies continued after Cerpac moved West. The Beale Air Force Base job was defined in Contract Agreements between the parties in which Cerpac took on responsibility for substantial portions of the prime contract, including specific sections of the labor and material requirements of the prime contract. The agreements were referred to by the parties as "subcontracts" throughout this period and so referred to by the president of Rich at the trial of this case. The established operating procedures developed by Rich and Cerpac during their long working relationship on jobs all across the country were utilized throughout the progress of this particular project at Beale Air Force Base. Cerpac was hardly one of the unknown multitude of ordinary materialmen against which Rich could not, or could not to be expected to, easily protect itself. See *MacEvoy, supra*, 322 U.S. at page 110.

CONCLUSION

For the reasons stated above, Respondent submits that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

E. M. MURRAY
DENNIS S. HARLOWE
GORDON, THOMAS, HONEYWELL,
MALANCA, PETERSON,
O'HERN & JOHNSON
Counsel for Respondents